

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION SUMMARY FOR BOARD HEARING

3 In the Matter of the Petition for Redetermination)
 4 Under the Sales and Use Tax Law of:)
 5 JAMES J. BRENNAN) Account Number: SR AS 53-002541
 6) Case ID 358974
)
) Petitioner) Torrance, Los Angeles County

7 Type of Liability Responsible person liability

8 Liability Period: 7/1/03 – 9/30/03

9 Items Amounts in Dispute

10 Responsible person liability \$440

| | <u>Tax</u> | <u>Penalties</u> |
|---|--------------------|----------------------------|
| 11 As determined | \$21,051.34 | \$4,282.93 |
| 12 Adjustment: Sales and Use Tax Department | -2,017.00 | -2,306.83 |
| 13 Appeals Division | | <u>-883.22¹</u> |
| 14 Proposed redetermination | <u>\$19,034.34</u> | <u>\$1,092.88</u> |
| 15 Amount concurred in | <u>-19,034.34</u> | <u>-653.36</u> |
| 16 Protested | <u>\$0.00</u> | <u>\$439.52</u> |
| 17 Proposed tax redetermination | \$19,034.34 | |
| 18 Interest | 72.86 | |
| 19 Penalty | <u>1,092.88</u> | |
| 20 Total tax, interest, and penalty | \$20,200.08 | |
| 21 Payments | <u>-19,760.56</u> | |
| 22 Balance due | <u>\$439.52</u> | |

23 ¹ The corporation failed to file a sales and use tax return for the third quarter 2003 (3Q03). On June 23, 2004, a Notice of
 24 Determination was issued to the corporation for tax of \$21,778.00 and a failure to file (FTF) penalty of \$2,177.80. The
 25 Notice of Determination also reflects a payment of \$726.66 which the Department had applied on September 12, 2003, so
 26 the net tax due was shown as \$21,051.34. Since the corporation did not petition or pay the determination before it went
 27 final, a finality penalty of \$2,105.13 was imposed on the corporation. The unpaid balance for 3Q03 was billed to petitioner
 28 as a responsible person for this period. In 2006, based on documentation provided by the corporation, the Department
 concluded that the tax liability should be reduced by \$2,017.00, which served to also reduce each penalty by \$201.70.
 After these adjustments, the remaining balance was \$19,034.34 in tax, \$1,976.10 in FTF penalty, and \$1,903.43 in finality
 penalty. Also in 2006, the Department applied two other payments retroactively to the amounts due for 3Q03. The
 Department applied a payment of \$8,105.56 effective on September 23, 2003, to reduce the tax remaining due to
 \$10,928.78, and then applied a payment of \$11,655.00 effective on November 6, 2003, to pay the tax liability and interest
 in full and a portion of the FTF penalty, leaving unpaid FTF penalty of \$1,322.74 (\$1,976.10 - \$653.36). Because the tax
 liability was paid in full, the Department deleted the remaining finality penalty of \$1,903.43. Thus, the Department deleted
 \$2,306.83 in penalties as a result of the audit adjustment and the retroactively applied payments. However, upon our
 review in preparing this summary, we asked the Department why it had not adjusted the FTF penalty for the September 12,
 2003 payment made prior to the due date of the return and the 2006 payment which the Department retroactively applied as
 of September 23, 2003, also before the due date of the return. The Department agreed to treat those payments as
 prepayments and thus reduced the FTF penalty by \$883.22 to \$439.52.

1 This matter was scheduled for Board hearing on October 20, 2010, but the oral hearing was
2 postponed because petitioner's representative had a scheduling conflict.

3 UNRESOLVED ISSUE

4 **Issue:** Whether reasonable cause has been established to relieve the penalty for failure to file a
5 return, originally assessed against 3MI, for which petitioner is being held liable as a responsible
6 person. We conclude there is no basis for relief.

7 3MI sold auto parts and accessories and customized luxury cars from January 1, 1999, through
8 September 30, 2003, the effective date of the close out of its seller's permit. 3MI had an outstanding
9 liability based on a Notice of Determination issued on June 23, 2004, based on a compliance
10 assessment after 3MI failed to file a sales and use tax return for the third quarter of 2003 (3Q03).
11 Since 3MI did not file a timely petition for redetermination for this determination, it became final and a
12 finality penalty was added. The Sales and Use Tax Department (Department) found that petitioner is a
13 responsible person pursuant to Revenue and Taxation Code section 6829 for the unpaid liabilities for
14 3Q03 and issued a Notice of Determination to him on that basis.² Initially, petitioner contended that he
15 is not a responsible person for purposes of section 6829, but at the appeals conference, petitioner
16 conceded that he is liable as a responsible person under section 6829 for the 3Q03 liability, but asserts
17 that there should be no remaining 3Q03 liability because the only liability remaining, a penalty for the
18 failure to file the 3Q03 return, should be eliminated.

19 There is no statutory or regulatory authority for relieving this penalty in section 6829
20 determinations, but if petitioner could show that the penalty should be relieved as to 3MI under
21 Revenue and Taxation Code section 6592, the relief would also inure to petitioner's benefit. Petitioner
22 has submitted a request for relief of the penalty on 3MI's behalf, signed under penalty of perjury,
23 arguing that 3MI fully paid the liability due for the 3Q03, even though it did not file a return.
24 However, the 3Q03 return was due on October 31, 2003, while the last payment made to fully pay the
25 liability due for the 3Q03 was applied effective November 6, 2003, after the failure to file penalty had
26

27 ² 3MI also had a liability from a Notice of Determination issued to it for periods prior to 3Q03, but the Department did not
28 pursue petitioner for that liability as a responsible person under section 6829.

1 fully accrued. Additionally, 3MI did not file the 3Q03 return to which the payments applied until
2 August 16, 2006. Consequently, we find that reasonable basis has not been provided for 3MI's failure
3 to file a timely return and we are not otherwise aware of any. Therefore, we find that relief from the
4 failure-to-file penalty is not warranted.

5 **OTHER DEVELOPMENTS**

6 The Department also issued responsible person determinations for the unpaid liabilities of 3MI
7 to Marc Laidler (SR AS 53-002537) and Constantina Susie Frial (SR AS 53-002540) for the period
8 April 1, 1999, to September 30, 2003, and they each filed a timely petition for redetermination which
9 is scheduled for hearing before the Board at the same meeting as petitioner's appeal.

10
11 Summary prepared by Rey Obligacion, Retired Annuitant
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28